Supreme Court, U.S.
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No._____

In the Supreme Court of the United States

OCTOBER TERM, 1995

KEITH GORDON HAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether, consistent with the Double Jeopardy Clause of the Fifth Amendment, a defendant can be retried after a mistrial based on his "implied consent" to the mistrial, and, if so, whether the doctrine of "implied consent" is consistent with Double Jeopardy principles when the trial court has not declared a mistrial, but has dismissed the jury before it has rendered a verdict on a count of the indictment.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at United States v. Ham, 58 F.3d 78 (4th Cir. 1995), and is set forth in the appendix at App.1. The memorandum opinion of the District Court is unpublished. The relevant portion of the memorandum opinion is set forth in the appendix at App. 16.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 20, 1995. A timely petition for rehearing and suggestion for rehearing in banc was denied by order entered on July 18, 1995. (App. 14) This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the United States Constitution provides, in

pertinent part:

> .... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

18 U.S.C. § 1963(a) provides, in pertinent part:

> Whoever violates any provision of Section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law --
>
> (1) any interest the person has acquired or maintained in violation of Section 1962;
>
> (2) any --
> (A) interest in;
> (B) security of;
> (C) claim against; or
> (D) property or contractual right of any kind affording a source of influence over;
>
> any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962; and

> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of Section 1962.

Rules 31(e) of the Federal Rules of Criminal Procedure provides:

> if the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

STATEMENT OF THE CASE

Petitioner Kirtanananda Swami Bhaktipada ("Swami") (referred to in the indictment as Keith Gordon Ham) is the spiritual leader of a branch of the Hare Krishna religion that in the late 1960s settled in West Virginia in a community known as New Vrindaban. In May, 1990, after many years of investigation by federal and local officials, and after a previous federal criminal trial had resulted in

acquittals, Swami was indicted by the federal government and charged with, among other things, three counts of violating the criminal RICO statute.[1] In an unprecedented step, the government named a religious parish, the New Vrindaban community, as the racketeering enterprise, and then sought forfeiture of all the community's property, including its place of worship and the land on which the religious devotees lived and worked.

Swami was tried in March, 1991 and was convicted on a number of the counts of the indictment. He appealed his

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[1] Count One of the indictment charged Swami with conspiracy to violate RICO; Count Two charged him with participating in the affairs of the New Vrindaban community through a pattern of racketeering activity. Both of these counts alleged that Swami had either agreed to the commission of, or had committed, five unrelated racketeering acts. Count Three of the indictment charged Swami with investing income derived from a pattern of racketeering activity.

conviction on several grounds. On July 1, 1993, the Court of Appeals for the Fourth Circuit vacated Swami's conviction, holding that the admission of highly inflammatory evidence had "infected" Swami's trial. United States v. Ham, 998 F.2d 1247, 1254 (4th Cir. 1993).

After the case was remanded, Swami moved, among other things, to preclude retrial of the forfeiture count of the indictment. At the first trial, the jury had not rendered a special verdict on the "extent of [Swami's] interest or property subject to forfeiture," as required by Rule 31(e) of the Federal Rules of Criminal Procedure. In support of his motion, Swami argued that he had a constitutional right to have the first jury render a verdict on the forfeiture count, and that, because there was no "manifest necessity" for dismissing the jury before it had done

so, retrial of that count was barred by the Double Jeopardy Clause of the Fifth Amendment.

The District Court denied the motion, and Swami appealed pursuant to 28 U.S.C. § 1291 and Abney v. United States, 431 U.S. 651 (1977). The Fourth Circuit, although holding Double Jeopardy principles applicable, treated the failure to submit a count to the jury as the functional equivalent of a mistrial, and, noting a conflict in the Circuits on the issue, affirmed the denial of the motion on the ground that Swami's counsel had "impliedly consented" to the dismissal of the jury before it could render a forfeiture verdict. (App. 8-10)

The facts relevant to Swami's Double Jeopardy claim are as follows:

At the first trial, during the charging conference, Swami's counsel raised the issue of RICO forfeiture.

Defense counsel asked, as often occurs in such cases, that the jury determination on forfeiture be deferred until after a verdict on innocence or guilt. (Tr. 1983)

At the conclusion of the charging conference, the District Court ruled that it would bifurcate the findings on racketeering and forfeiture, and leave the extent of the forfeiture to be decided in the event there was a guilty verdict. Otherwise, in the Court's words, "it may become moot." (Tr.1986-87) The jury, however, was instructed to answer a very general "special interrogatory" about whether Swami had acquired an interest in a racketeering enterprise.[2] But the jury was never

---

[2] The jury was asked to decide:

> Did the defendant acquire an interest in, establish, and/or operate New Vrindaban Community with income received from racketeering acts as detailed in Counts I, II, and III.

asked to and did not render a verdict on the "extent of [Swami's] interest in the property subject to forfeiture" as required by Rule 31(e).

After the verdict was rendered, finding Swami guilty, inter alia, of the RICO counts of the indictment and answering the special interrogatory in the affirmative, the jury was polled, thanked, and immediately discharged without any further discussion of forfeiture. The record reflects that there was no discussion by the District Court of obtaining the Rule 31(e) special verdict or of reconvening the jury for an evidentiary hearing on the forfeiture question, and no objection by the government to the jury's failure to render the special verdict. There was no discussion of the consequences of discharging the jury before it could render that verdict. And the record is silent as to whether there was even an

opportunity for defense counsel to speak with the Court or Swami about the failure of the jury to decide the forfeiture count before the jury was dismissed.

At the sentencing hearing, the government asked the District Court to enter a judgment requiring the forfeiture of the property specified in the indictment. When defense counsel objected on the ground that the jury had not rendered the requisite Rule 31(e) verdict, the government responded by claiming that the burden was on Swami to secure the necessary forfeiture verdict. The District Court firmly rejected that argument and instead made a factual finding that the failure to submit the forfeiture count to the jury was "the court's fault, not the defendant's." (Sentencing Tr. 41)

In light of Rule 31(e), the Court did not order forfeiture of any

specific property. Instead, the Court instructed the government that if property was to be forfeited, "you ought to set it down for a jury." (Sentencing Tr. 44) The government did nothing.

After the case was remanded to the District Court, Swami moved to dismiss the forfeiture count on Double Jeopardy grounds. On June 27, 1994, the District Court, in essence finding that the special interrogatory was the equivalent of a Rule 31(e) verdict, denied Swami's Double Jeopardy motion. (App. 16)

On June 20, 1995, the Fourth Circuit affirmed. The Fourth Circuit disagreed with the District Court's conclusion that the forfeiture issue was submitted to the jury despite the absence of a Rule 31(e) verdict, and held that "double jeopardy rules .... apply when the court fails to try a

discrete portion of the case before the jury." (App. 8) The Court noted, however, that, after a mistrial, a defendant can be retried if he has consented to the mistrial. (App. 7) Then, treating the failure to submit the forfeiture count as the functional equivalent of a "mistrial" (App. 8), and applying the so-called doctrine of "implied consent," the Court held that, even though Swami had not "expressly consent[ed] to the dismissal of the jury before it decided the Rule 31(e) forfeiture issue" (App. 8), and even though defense counsel had indicated that he did not think that the government had introduced any evidence to support forfeiture of particular property (Tr. 1983), Swami waived his right to assert a Double Jeopardy bar to retrial of the forfeiture count because defense counsel did not "interrupt[] the judge before he

discharged the jury and remind[] him that the jury had not completed the forfeiture phase of the trial." (App. 9-10)

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER THE DOCTRINE OF "IMPLIED CONSENT" IS CONSISTENT WITH THE DOUBLE JEOPARDY CLAUSE AND, IF SO, WHETHER THERE MUST BE SOME POSITIVE INDICATION THAT THE DEFENDANT HAS CONSENTED TO WAIVE HIS DOUBLE JEOPARDY RIGHT TO HAVE HIS CASE DECIDED BY THE FIRST JURY IMPANELLED

The Fifth Amendment to the Constitution provides that "no person shall .... be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. This guarantee "represents a fundamental ideal in our constitutional heritage." Benton v. Maryland, 395 U.S. 784, 794 (1969).[3]

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[3] Although the Fifth Amendment speaks of "life or limb," it has long been established that it applies with

The Double Jeopardy Clause serves several weighty interests. Chief among them is to ensure that a defendant has his "fate determined by the jury first impanelled." Illinois v. Somerville, 410 U.S. 458, 471 (1973). A second trial "increases the financial and emotional burden of the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be

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equal force to monetary punishments. See, e.g., Ex parte Lange, 85 U.S. 163, 18 Wall. 163 (1873). It is now beyond question that the Double Jeopardy Clause applies to even civil forfeiture or penalties if imposed as punishment for a crime. Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994) (tax on possession of illegal drugs after imposition of criminal penalty for the same conduct violates the Double Jeopardy Clause); United States v. Halper, 490 U.S. 435 (1989) (Double Jeopardy Clause prohibits second sanction if the forfeiture cannot be characterized as remedial). See also Austin v. United States, 113 S. Ct. 2801 (1993) (Excessive Fines Clause of the Eighth Amendment applies to civil in rem forfeiture).

convicted." Arizona v. Washington, 434 U.S. 497, 503-04 (1978). The very reason that jeopardy attaches as a constitutional matter when the jury is sworn "lies in the need to protect the interest of the accused in retaining a chosen jury." Crist v. Bretz, 437 U.S. 28, 35 (1978).

When a trial is cut short before the jury has rendered a verdict, the defendant has been deprived of his "valued right to have his trial completed by a particular tribunal." United States v. Jorn, 400 U.S. 470, 474 (1971), quoting Wade v. Hunter, 336 U.S. 684, 689 (1949). See also Green v. United States, 355 U.S. 184, 187 (1957). Thus, when a mistrial has been declared, Double Jeopardy will preclude mistrial unless, in Justice Story's oft-quoted words, "there is a manifest necessity for the [mistrial] or the ends of justice would otherwise be

defeated." United States v. Perez, 9 Wheat 579, 580, 6 L.Ed. 165 (1824).

This Court has long recognized an exception to this rule: if a defendant requests, or expressly consents to a mistrial, Double Jeopardy does not preclude a retrial. United States v. Scott, 437 U.S. 82 (1978); United States v. Dinitz, 424 U.S. 600 (1976); United States v. Tateo, 377 U.S. 463 (1964). As the Court has explained:

> If that right to go to a particular tribunal is valued it is because ... the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.

Jorn, 400 U.S. at 485.

When the defendant has made a conscious choice not to proceed with a trial tainted by error, even though he has already incurred expense and anxiety, and even though that trial might end with an acquittal, the interests served by the Double Jeopardy Clause have been vindicated. This is because, "the important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of .... error." Dinitz, 424 U.S. at 609.

The question that this case presents, however, and one which this Court has never addressed, is whether the interests protected by the Double Jeopardy Clause are also served when a trial is terminated prior to a complete verdict and the defendant has not expressly requested or consented to the premature discharge of the jury, but

the court "implies" his consent based not on defense counsel's agreement to the mistrial, but on defense counsel's silence.

The lower courts have struggled with this question, reaching widely inconsistent results. On the one hand, the Sixth Circuit has firmly and repeatedly rejected the notion that a failure of defense counsel to register an objection alone constitutes a "waiver" by the defendant of his Double Jeopardy right to have his case decided by the first tribunal. See Glover v. McMackin, 950 F.2d 1236, 1240 (6th Cir. 1991); United States v. White, 914 F.2d 747, 753 (6th Cir. 1990); Jones v. Hogg, 732 F.2d 53, 57 (6th Cir. 1984). Under the Sixth Circuit's view, Double Jeopardy principles preclude a court from simply assuming that a defendant has waived a valued constitutional right absent "some positive indication

from the record of defendant's willingness to consent to declaration of a mistrial." Malinovsky v. Court of Common Pleas, 7 F.3d 1263, 1272 (6th Cir. 1993), cert. denied, 114 S. Ct. 1300 (1994).

A number of Circuits have embraced the "implied consent" doctrine and have found "implied consent" to a mistrial on the basis of defense counsel's failure to object; even these Circuits, however, require evidence that the mistrial was contemplated before it was declared so there was "ample time to deliberate," United States v. Buljubasic, 808 F.2d 1260, 1266 (7th Cir.), cert. denied, 484 U.S. 815 (1987), and evidence that there was an opportunity for counsel to register an objection before the jury was dismissed. See, e.g., United States v. DiPietro, 936 F.2d 6 (1st Cir. 1991) (after prosecution made prejudicial

comment during closing, court called conference to discuss how to proceed, then, after announcing mistrial, gave lengthy explanation on record); United States v. Puleo, 817 F.2d 702, 705 (11th Cir.), cert. denied, 484 U.S. 978 (1987) (after giving Allen charge, court declared mistrial when jury could not reach verdict; under such circumstances, "where the trial judge expressed a clear intent to declare a mistrial and the defense counsel had an opportunity to object but did not," consent would be implied); but see United States v. Bates, 917 F.2d 388 (9th Cir. 1990) (no implied consent where court suddenly declared mistrial and jury discharged before defense counsel had an opportunity to object); Lovinger v. Circuit Court, 845 F.2d 739 (7th Cir.), cert. denied, 488 U.S. 851 (1988) (same).

At the other extreme, the Fourth Circuit, in this case, created a pure legal fiction. It first determined that it would treat the failure to submit a count to the jury -- a failure the district court found was "the court's fault, not the defendant's" -- as if it were a declaration of a mistrial. It then ruled that a court can imply that a defendant has consented to the functional equivalent of a "mistrial" even when there has been no forewarning that a "mistrial" was contemplated, no declaration of a mistrial on the record, and no indication that defense counsel had an opportunity to discuss with either the Court or the defendant the consequences of remaining silent. Thus, in sharp conflict with the Sixth Circuit approach, under the Fourth Circuit rule, a defendant can be retried after a "mistrial" in the absence of

"manifest necessity" and despite the lack of any evidence that the defendant consciously chose to forego his right to have his trial concluded before the first tribunal.

This Court has long established standards for determining whether a defendant has "waived" a constitutional right. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." See, e.g., Johnson v. Zerbst, 304 U.S. 458, 464 (1938). When a defendant waives a constitutional right, he must do so with "sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970). In other words, a defendant's waiver of a constitutional right must be knowing, voluntary and intelligent. Zerbst, 304 U.S. at 464; Miranda v.

Arizona, 384 U.S. 436, 469 (1966).[4]

In Dinitz, this Court suggested, in dictum, that strict application of this constitutional waiver doctrine was not required when a defendant requested or consented to a mistrial because, under such circumstances, the defendant's Double Jeopardy rights are fully vindicated by his conscious decision to forego a verdict by the first jury impanelled. 424 U.S. at 609, n.11. Whether that dictum should constitute a guiding principle of constitutional law, however, is still an open question. Moreover, even if something less than the Johnson v. Zerbst standard of waiver is applicable

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[4] Some statutory rights are deemed so crucial, they too can only be waived knowingly and voluntarily. See, e.g., United States v. Wiggins, 905 F.2d 51, 53 (4th Cir. 1990) (right to appeal). And when this standard applies, courts cannot "presume waiver from a silent record." United States ex rel. Wandick v. Chrans, 869 F.2d 1084, 1087 (7th Cir. 1989).

in the Double Jeopardy context, this Court has never squarely addressed whether a defendant can be presumed to have waived his "valued right" to have his case decided by the first tribunal on the basis, not of defendant's request for or express consent to a mistrial, but on the basis of defense counsel's silence.

In the absence of a definitive ruling by this Court, the constitutional propriety of the "implied consent" doctrine will continue to plague the lower courts, leading to continued conflict among the Circuits and even among individual judges of particular Circuits. See, e.g., Camden v. Circuit Court of the Second Judicial Circuit, 892 F.2d 610 (1st Cir. 1989) (Wood, J.) and at 619 (Posner, J., dissenting). This case provides a perfect opportunity for this Court to resolve the conflict, to

decide whether the doctrine of "implied consent" is consistent with Double Jeopardy principles, and, if it is, to set clear standards for when a court can find that a defendant has impliedly consented to the termination of his trial prior to a full and complete verdict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 19, 1995

A P P E N D I X

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEITH GORDON HAM, a/k/a Kirtanananda, a/k/a K. Swami, a/k/a Kirtanananda Swami Bhaktipada, a/k/a Srila Bhaktipada, a/k/a Number One,
Defendant-Appellant.

No. 94-5507

Appeal from the United States District Court
for the Northern District of West Virginia, at Elkins.
Robert R. Merhige, Jr., Senior District Judge,
sitting by designation.
(CR-90-87)

Argued: March 6, 1995

Decided: June 20, 1995

Before RUSSELL, WIDENER, and HALL,
Circuit Judges.

Affirmed by published opinion. Judge Russell wrote the opinion, in which Judge Widener and Judge Hall joined.

COUNSEL

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United States Attorney, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Amy Adelson, DERSHOWITZ & EIGER, P.C., New York, New York, for Appellant. William D. Wilmoth, United States Attorney, Nina Goodman, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

OPINION

RUSSELL, Circuit Judge:

This appeal raises the issue of whether the Double Jeopardy Clause bars retrial of the forfeiture count of a RICO indictment where the district court, at the original trial, failed to instruct the jury to consider a required issue and enter a special verdict pursuant to Rule 31(e) of the Federal Rules of Criminal Procedure. Furthermore, this Court must also decide whether the Double Jeopardy Clause bars the retrial of certain RICO predicate acts where the original jury did not indicate on the verdict form that it unanimously found the defendant guilty of those predicate acts. We hold that double jeopardy does not apply in either instance.

I.

Keith Gordon Ham, also known as Kirtanananda Swami Bhaktipada ("Swami"), is the spiritual leader of the New Vrindaban Hare Krishna community in West Virginia. In May 1990, a federal grand jury returned an indictment charging Swami with three counts of violating the RICO statute (18 U.S.C. § 1962), six counts of mail fraud, and two counts regarding a related murder.[1] The indictment also

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[1]More specifically, the indictment charged Swami with conspiring to conduct and participate in the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d) (Count I), conducting the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c) (Count II), investing income derived from a pattern of racketeering activity in the operation of an enterprise (Count III), two counts of conspiring to commit mail fraud in

included a separate forfeiture count in which the government sought forfeiture of all of the property owned by the New Vrindaban community. After a trial, the jury convicted Swami on the RICO and mail fraud counts but failed to reach a verdict on the murder counts.

A. *The Forfeiture Count*

Rule 31(e) of the Federal Rules of Criminal Procedure requires in forfeiture trials that "a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." The jury at Swami's trial never rendered a special verdict on the extent of Swami's interest or property subject to forfeiture.

Before the district court charged the jury at trial, Swami's defense counsel requested that the court not submit the forfeiture count to the jury until the jury returned a guilty verdict on any of the RICO counts. The district court agreed with the suggestion and ruled that the jury should decide only whether racketeering proceeds went into the properties subject to forfeiture. The district court did not have the jury decide the extent of Swami's interest or property subject to forfeiture; the court postponed consideration of that issue until it was clear that the jury would convict on the RICO counts.

In response to the district court's ruling, Swami's attorney drafted the following interrogatory to be answered if the jury found Swami guilty of any of the RICO counts:

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violation of 18 U.S.C. § 371 (Counts VI and VIII), four counts of substantive mail fraud in violation of 18 U.S.C. § 1341 (Counts VII, IX, X, and XI), one count of conspiring to murder in violation of 18 U.S.C. § 371 (Count IV), and one count of aiding and abetting to commit murder in violation of 18 U.S.C. § 1958 (Count V).

Terry Sheldon was a co-defendant in the RICO conspiracy count, the substantive RICO counts, the conspiracy to commit murder count, and the aiding and abetting to commit murder count. Terry Sheldon and Steven Fitzpatrick were co-defendants in one of the mail fraud conspiracy counts and one of the substantive mail fraud counts.

> Did the defendant acquire an interest in, establish, and/or operate New Vrindaban Community with income received from racketeering acts as detailed in [the RICO counts]?

The jury answered this interrogatory in the affirmative, but the court never held an evidentiary hearing on the extent of Swami's interest or property subject to forfeiture. The district court discharged the jury without its having rendered a special verdict as required by Rule 31(e).

At sentencing, Swami raised the government's failure to obtain a special verdict on the extent of Swami's interest in the property subject to forfeiture. Although the government attempted to shift the burden of securing the special verdict to the defendant, the district court held that any failure to comply with Rule 31(e) "is the court's fault, not the defendant's." Because the jury had not returned a special verdict under Rule 31(e), the district court did not order the forfeiture of any specific property but only entered a general order that "the defendant Swami shall forfeit to the United States all of his interest in all of the real estate identified by the United States in the forfeiture count of the indictment . . . ." Nonetheless, the district court concluded that a new jury could make the requisite findings under Rule 31(e) and advised the prosecutor to "set it down for a jury."

B. *The Predicate Acts*

The verdict form that was submitted to the jury required, for most of the counts, only that the jury decide whether the defendant was guilty or not guilty. For the RICO conspiracy count (Count I) and one of the substantive RICO counts (Count II), however, the verdict form also stated the following inquiry:

> IF YOU FIND THE DEFENDANT GUILTY OF [the count] PLEASE CHECK THE PARTICULAR PREDICATE ACTS YOU HAVE UNANIMOUSLY CONCLUDED HAVE BEEN PROVEN BY THE UNITED STATES WITH RESPECT TO DEFENDANT SWAMI.

1) STEPHEN BRYANT MURDER _____
2) CHARLES ST. DENNIS MURDER _____
3) DEVON WHEELER KIDNAPPING _____
4) MAIL FRAUD: FUNDRAISING _____
5) MAIL FRAUD: ALLSTATE INSURANCE _____

The jury found Swami guilty of the RICO conspiracy count (Count I) and checked all of the predicate acts except the Stephen Bryant murder. The jury also found Swami guilty of the RICO substantive count (Count II) but did not check either the Stephen Bryant murder or the Charles St. Dennis murder as predicate acts.

C. *Post-trial Proceedings*

Swami appealed to this Court, and we vacated Swami's convictions and remanded for a new trial.[2] *United States v. Ham*, 998 F.2d 1247 (4th Cir. 1993). This Court concluded that the district court erred in admitting evidence of child molestation, homosexuality, and mistreatment of women because the danger of unfair prejudice outweighed the probative value of the evidence.

On remand to the district court, Swami moved, *inter alia*, to dismiss the forfeiture count and the two predicate acts that the jury did not check on the verdict form. Swami argued that the Double Jeopardy Clause of the Fifth Amendment bars retrial of the forfeiture count because the district court failed to have the jury render a special verdict under Rule 31(e). Swami also argued that the original jury, by failing to check several of the predicate acts on the verdict form, implicitly acquitted him of those acts; therefore, Swami contended that double jeopardy bars the government from retrying him on those predicate acts.

The district court denied both motions to dismiss. With regard to the forfeiture count, the district court concluded that the jury's affirmative answer to the special interrogatory on the verdict form was sufficient to comply with the requirements of Rule 31(e) even though it did not specify the extent of Swami's interest or property subject

[2]We also vacated the convictions of Terry Sheldon and reversed the convictions of Steven Fitzpatrick.

to forfeiture. With regard to the predicate acts, the district court concluded that the failure to check a particular predicate act did not constitute an implicit acquittal of that act. Swami now appeals to this Court. We affirm the district court's denial of the motions to dismiss, but our reasoning differs with respect to the forfeiture count.

II.

The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause unequivocally prohibits the State from retrying a defendant after an acquittal. *Arizona v. Washington*, 434 U.S. 497, 503 (1978). As the Supreme Court has explained:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a constant state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). Thus, a verdict of acquittal is final and a bar to all subsequent prosecution for the same offense, even where the acquittal was based upon an egregiously erroneous foundation. *Washington*, 434 U.S. at 503.

However, a verdict of guilt or innocence is not required for the double jeopardy bar to apply. The Double Jeopardy Clause also protects a defendant's right to have his trial completed by the particular tribunal he or she has chosen. *Id.* Jeopardy attaches once a defendant is put to trial before a jury, and the Double Jeopardy Clause generally bars retrial if the jury is discharged without the defendant's consent. *Green*, 355 U.S. at 188. "This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." *Id.* Thus, the government is entitled to only "one fair opportunity to offer whatever proof it [can] assemble." *Burks v. United States*, 437 U.S. 1, 16

(1978). If the government cannot meet its burden of proof at the first trial, the Double Jeopardy Clause prevents the court from withholding the issue from the jury and allowing the government to reprosecute before a more favorable jury.

Nonetheless, the Double Jeopardy Clause does not automatically bar retrial when a criminal proceeding is terminated without a final resolution on the merits of the charges. As the Supreme Court has explained:

> Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.

Washington, 434 U.S. at 505. The Supreme Court has long since formulated the following rules for determining whether double jeopardy bars reprosecution after a mistrial. If a judge declares a mistrial over the defendant's objection or without the defendant's consent, the defendant cannot be retried unless there was "manifest necessity" for the termination of the first trial. *Arizona*, 434 U.S. at 509-10; *Green*, 355 U.S. at 188; *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824); *United States v. Council*, 973 F.2d 251, 255 (4th Cir. 1992). However, if the defendant moved for mistrial or otherwise consents to the mistrial, the defendant can be reprosecuted unless he can demonstrate that the prosecutor or judge provoked the mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982).

In this case, the district court did not declare a mistrial; instead, the district court completed most of the trial but failed to try a discrete issue required for conviction of the forfeiture count. Under Rule 31(e), a district court cannot enter an order of forfeiture unless a jury has entered a special verdict regarding the extent of the defendant's interest or property subject to forfeiture. The district court below never held an evidentiary hearing on the extent of Swami's interest and never directed the jury to enter a special verdict on the issue. The jury issued a verdict on all the issues presented to it, thus completing

those portions of the trial. But, the trial never even began on the Rule 31(e) forfeiture issue.

We hold that the double jeopardy rules that apply in mistrial situations also apply when a court fails to try a discrete portion of the case before the original jury. If the failure to try a discrete issue occurs over the defendant's objection or without the defendant's consent, the court cannot try that issue before a second jury unless there was "manifest necessity" for withholding it from the original jury. On the other hand, if the failure to try the discrete issue occurs at the defendant's request or otherwise with the defendant's consent, the court can try that issue before a second jury unless the defendant can demonstrate that the prosecutor or judge improperly provoked the defendant's request or consent.

Swami did not expressly consent to the dismissal of the jury before it decided the Rule 31(e) forfeiture issue. Nonetheless, Swami's consent may be implied from his failure to object to the district court's dismissal of the jury. In mistrial situations, a number of circuits have held that a defendant impliedly consents to a mistrial if the defendant had an opportunity to object to the mistrial but fails to do so. *See United States v. DiPietro*, 936 F.2d 6, 9-10 (1st Cir. 1991) (implied consent where defendant did not object to mistrial even though defendant should have anticipated declaration of mistrial and where trial judge remained in courtroom afterward to discuss case with attorneys); *Camden v. Circuit Court of Second Judicial Dist., Crawford County, Ill.*, 892 F.2d 610, 614-18 (7th Cir. 1989) (implied consent where defendant did not object to mistrial although "[d]efense counsel should have anticipated the possibility of a mistrial and been prepared to object or suggest more acceptable alternatives when the trial judge announced his ruling"), *cert. denied*, 495 U.S. 921 (1990); *United States v. Puleo*, 817 F.2d 702, 705 (11th Cir.) (implied consent where trial judge expressed clear intent to declare mistrial and defense counsel had opportunity to object but did not), *cert. denied*, 484 U.S. 978 (1987); *United States v. Smith*, 621 F.2d 350, 352 (9th Cir. 1980) (implied consent where defendant did not object after declaration of mistrial although, before dismissal of jury, court and attorneys discussed instructions to jury upon dismissal and schedule for retrial), *cert. denied*, 449 U.S. 1987 (1981); *United States v. Goldstein*, 479 F.2d 1061, 1067 (2d Cir.) ("Consent need not be express, but may be

implied from the totality of circumstances attendant on a declaration of mistrial."), *cert. denied*, 414 U.S. 873 (1973). *But see Glover v. McMackin*, 950 F.2d 1236 (6th Cir. 1991) (holding that consent should be implied "only where the circumstances positively indicate a defendant's willingness to acquiesce in the [mistrial] order"); *United States v. White*, 914 F.2d 747, 753 (6th Cir. 1990) (same).[3] However, a defendant's failure to object does not constitute implied consent if he had no opportunity to object. *United States v. Jorn*, 400 U.S. 470, 487 (1971) (trial judge did not exercise sound discretion when he abruptly discharged jury, offering no opportunity for defendant to object to mistrial); *United States v. Bates*, 917 F.2d 388, 393 (9th Cir. 1990) (no implied consent where defense counsel, immediately after judge declared mistrial, requested to talk to judge outside jury's presence, but judge did not grant request); *Lovinger v. Circuit Court of the 19th Judicial Circuit, Lake County, Ill.*, 845 F.2d 739 (7th Cir.) (no implied consent where judge, immediately after declaring mistrial, left courtroom and "was gone before the defense had any reasonable opportunity to consider the import of his statement and act upon it"), *cert. denied*, 488 U.S. 851 (1988).

Similarly, if a defendant has an opportunity to object to the trial court's dismissal of the jury before it decides a discrete portion of the case, but fails to do so, the defendant impliedly consents to the jury's dismissal and cannot raise a double jeopardy defense to further prosecution before a second jury. The record in this case shows that, after the clerk read the verdict and the defendants polled the jury, the district judge thanked the members of the jury for their time and effort, apologized for their inconvenience, and wished them a Happy Easter. With these short remarks, the district judge was clearly dismissing the jury. Swami's counsel could have interrupted the judge before he dis-

[3]Although the Sixth Circuit does not follow the majority view, the First Circuit has concluded that the Sixth Circuit has actually not set a different standard. "Even where courts have held that the failure to object did not foreclose a good double jeopardy plea, they have generally done so because there was no opportunity to object." *DiPietro*, 936 F.2d at 10. The First Circuit noted that, in *United States v. White*, 914 F.2d 747 (6th Cir. 1990), the defendant's failure to object to the mistrial did not waive the double jeopardy bar to a new trial because the defense had no time to object. *DiPietro*, 936 F.2d at 10-11.

charged the jury and reminded him that the jury had not completed the forfeiture phase of the trial. If Swami had wanted the original jury to decide the Rule 31(e) forfeiture issue, he should have informed the court of this desire before it dismissed the jury.[4]

Although Swami had a right to have the original jury decide the Rule 31(e) forfeiture issue, he could have asserted this right and prevented the district court from prematurely dismissing the jury. He did not do so. Swami cannot avoid a second trial on the forfeiture count on double jeopardy grounds and thereby profit from his failure to act. The actions of Swami's attorneys suggest that the double jeopardy argument was a mere afterthought that one of Swami's attorneys conjured up long after the district court dismissed the original jury. *Cf. Camden*, 892 F.2d at 618 (concluding that defendant's double jeopardy argument was "merely an afterthought that took form long after the first trial ended in a mistrial").

We conclude that Swami impliedly consented to the district court's dismissal of the jury and, therefore, that the district court can try the Rule 31(e) forfeiture issue before a second jury without a showing of manifest necessity. We hold that double jeopardy does not bar retrial of the forfeiture count of Swami's indictment.

III.

We turn now to Swami's contention that double jeopardy bars retrial of the RICO predicate acts that the original jury did not check on the verdict form. Swami argues that the original jury had an opportunity to render a verdict on the Stephen Bryant and Charles St. Dennis murders,[5] and that its failure to check those predicate acts on the verdict form should be treated as an implied acquittal.

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[4]We note that Swami probably had strategic reasons for not reminding the court. It is unlikely that Swami wanted the same jury that had just convicted him of nine of the eleven counts also to decide the remaining forfeiture issue.

[5]The jury did check the Charles St. Dennis murder as a predicate act for the RICO conspiracy count (Count I). It did not check it as a predicate act for the substantive RICO count (Count II). Swami argues that double jeopardy bars retrial of the St. Dennis murder only as to the substantive RICO count.

Swami finds support for his argument in *Green v. United States*, 355 U.S. 184 (1957). In that case, Green was tried for both first and second degree murder; the jury convicted Green of second degree murder, but the verdict was silent on the first degree murder charge. *Id.* at 186. Green successfully appealed his second degree murder conviction, and on remand for a new trial, Green argued that the Double Jeopardy Clause barred retrial of the first degree murder charge. The Supreme Court concluded that the "second trial for first degree murder placed Green in jeopardy twice for the same offense in violation of the Constitution." *Id.* at 190.

The Supreme Court reasoned that Green had been forced to run the gauntlet once on the charge of first degree murder and that the jury had refused to convict him. *Id.* The jury had the choice between convicting him on first or second degree murder, and it chose the latter. *Id.* The Supreme Court regarded the jury's verdict as an implied acquittal on the first degree murder charge. *Id.* It relied on the fact that the jury had been dismissed without Green's consent and without its having returned an express verdict on the first degree murder charge. *Id.* at 191. The Supreme Court reasoned that the jury "was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." *Id.* Therefore, the Court concluded that "Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense." *Id.*

More generally, the Supreme Court held in *Green* that "the double jeopardy clause precludes a prisoner's retrial for a greater offense after reversal of his conviction of a lesser included offense." *United States v. Johnson*, 537 F.2d 1170, 1174 (4th Cir. 1976); *see also United States v. Tateo*, 377 U.S. 463, 465 n.1 (1964) (*Green* "holds only that when one is convicted of a lesser offense included in that charged in the original indictment, he can be retried only for the offense of which he was convicted rather than that with which he was originally charged.").

Swami argues that he has been forced to run the gauntlet on all five predicate acts, and that the jury did not convict him on the predicate acts regarding the Bryant and St. Dennis murders. Swami urges this Court to conclude, like the *Green* Court, that the failure to return a

verdict on those predicate acts constitutes an implied acquittal, thus barring a second prosecution on those acts. Swami also argues that, although he was prosecuted on RICO charges with five predicate acts, he was convicted of lesser included offenses, namely a RICO conspiracy conviction with four predicate acts and a substantive RICO conviction with three predicate acts. Having successfully appealed these RICO convictions, Swami contends that he can be retried only on the lesser included offenses.

We do not agree. The jury's failure to check a predicate act does not constitute an implied acquittal of that act. The verdict form required the jury to "check the particular predicate acts you have unanimously concluded have been proven by the United States with respect to defendant Swami." The failure to check a predicate act may signify either that the jury unanimously concluded that Swami did not commit that act, or that the jury could not agree on a verdict for that act.

A jury's failure to decide an issue will be treated as an implied acquittal only where the jury's verdict necessarily resolves an issue in the defendant's favor. *See Schiro v. Farley*, 114 S. Ct. 783, 792 (1994) ("The failure to return a verdict does not have collateral estoppel effect . . . unless the record establishes that the issue was actually and necessarily decided in the defendant's favor."). In *Green*, for instance, the failure to issue a verdict on the first degree murder charge was treated as an implied acquittal because "Green's conviction of second-degree murder established the existence of a fact (the state of mind required for that offense) that was inconsistent with his being guilty of first-degree murder . . . ." *Kennedy v. Washington*, 986 F.2d 1129, 1134 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 876 (1994). Nothing in the jury's verdict in Swami's case establishes a fact inconsistent with a finding of guilt on the predicate acts.

We conclude that the Double Jeopardy Clause does not bar retrial of the predicate acts regarding the Stephen Bryant murder and the Charles St. Dennis murder.

IV.

For the reasons stated herein, we affirm the judgment of the district court.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA	)	FILED JULY 18, 1995
Plaintiff-Appellee	)	
vs.	)	
KEITH GORDON HAM, a/k/a Kirtanananda, a/k/a K. Swami, a/k/a Kirtanananda Swami Bhaktipada, a/k/a Srila Bhaktipada, a/k/a Number One	)	NO. 94-5507 CR-90-87
Defendant-Appellant	)	

On Petition for Rehearing
with Suggestion for
Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk

IN THE UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT
OF WEST VIRGINIA
MARTINSBURG DIVISION

Jun 27 1994
U.S. District
Court
Elkins, WV

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Case No.: 90-CR-00087-01
v.	)	
KEITH GORDON HAM, a/k/a KIRTANANANDA SWAMI BHAKTIPADA,	)	
Defendant.	)	

MEMORANDUM

This cause came before the Court on June 2, 1994, on various motions by defendant Keith Gordon Ham, a/k/a Kirtanananda Swami Bhaktipada ("Swami") as well as defendants Cathedral of Healing, Inc. ("COH"), Govardhan, Inc. ("Govardhan"), and New Vrindaban Community, Inc. ("NVC"). The motions have been well-briefed and are ripe for

disposition by the Court.

* * * * * * *

2. Motion to Dismiss RICO Forfeiture Charges for Violation of Double Jeopardy.

Defendant Swami also moves the Court, pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, to dismiss the RICO forfeiture charges of the Indictment. Rule 31(e), which implements the criminal forfeiture provision of RICO, provides that:

> [i]f the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

Fed. R. Crim. P. 31(e). Swami cites United States v., Amend, 791 F.2d 1120 (4th Cir.), cert. denied, 479 U.S. 930 (1986, stating, "[A] defendant is

entitled to a jury trial on the issue of whether a particular asset is forfeitable." Id. at 1128. Swami first notes that at no point has he executed a waiver sufficient to eliminate the jury trial requirement for forfeiture. Any such waiver, according to defendant, under United States v. Robinson, 1993 WL 4098000 (7th Cir. 1993) and United States v. Garrett, 727 F.2d 1003 (11th Cir. 1984), must be knowing and voluntary. Indeed, Swami points to the trial transcript section in which defense counsel requested that the jury determination on forfeiture be deferred until after a verdict on guilt or innocence.

After it rendered its verdict on guilt, defendant explains, the jury was immediately discharged. Although the

jury answered a special interrogatory tracking the language of RICO and stating generally that Swami had acquired an interest in New Vrindaban with income derived from racketeering acts, Swami states, the jury did not decide the extent of the interest or property subject to forfeiture. At the conclusion of the charging conference, Swami submits, the Court ruled that it would bifurcate the findings on racketeering and forfeiture, and leave the extent of forfeiture to be decided in the event there was a guilty verdict. Upon the Court's request, counsel prepared a special interrogatory reflecting the Court's ruling. Ultimately, the jury rendered a verdict of guilty on the RICO charges and answered the special interrogatory

in the affirmative.[1] However, Swami's motion focuses on the absence of a specific verdict on the extent of the forfeiture. This failure to render a special verdict on forfeiture, regardless of whether it was the result of the Government's omission or the Court's, Swami asserts places him twice in jeopardy of the same offense.

Defendant relies on Amend and United States v. Patel, 816 F.Supp. 1077 (E.D. Va. 1993) in arguing that the Government is barred from retrying Swami on the criminal forfeiture charges. Swami speculates that, had the forfeiture issue been submitted to the first jury, as required, that jury

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[1] At sentencing, the Court entered a general order of forfeiture and indicated that, in light of Rule 31(e), if specific property was to be forfeited, the government ought to set it down for a jury.

might have determined that Swami had only a minimal interest in the property sought to be forfeited.

The Government opposes defendant's motion on the grounds that, contrary to Swami's characterization of the proceedings, the Court did not ignore the requirements of Rule 31(e) and double jeopardy does not apply to this scenario. The Government assets that the Fourth Circuit has not ruled with specificity on the method by which the forfeiture allegation should be entertained. Not only did the defendant fail to request a bifurcated trial, the Government states, but he did not object to the admission of evidence regarding the property or forfeiture argument in the closing statements.

More importantly, according to the Government, Swami proposed his own verdict form with respect to forfeiture, and the Court submitted this form to the jury without objection. Under United States v. Zang, 703 F.2d 1186 (10th Cir. 1982), the Government states that parties can waive their right to a special verdict from under Rule 31(e) by not making a timely [illegible] defendant who does not object to the manner in which the forfeiture verdict form was issued, the Government urges, under United States v. L'Hoste, 609 F.2d 796 (5th Cir. 1980), cannot be heard to object to the verdict on appeal. Furthermore, the Government asserts, failure to comply with the technical requirements of Rule 31, under United States v. Hess, 691 F.2d 188 (4th Cir. 1982), does not

render the forfeiture illegal or subject to correction under Rule 35. Id. at 191.

The Court rejects Swami's attempt to characterize the jury's affirmative answer to the special interrogatory on forfeiture as a the equivalent of no verdict at all--and thereby triggering double jeopardy. While it is clear that the holding in Hess is concerned with an agreement effectively circumventing the requirements of 31(e), it is equally clear that the Amend decision draws from Hess in concluding that 31(e) demands a special verdict. In Hess, rather than a special verdict form on forfeiture, the jury considered the forfeiture question as a part of the two issues generally presented for their consideration. This means of handling the forfeiture

determination was "stipulated 'in lieu of a Special Verdict,'" and the jury's forfeiture verdict thereon was, the court concluded, "in no sense 'illegal' and subject to correction under Rule 35." Id. at 191. In light of the special interrogatory answered by the jury in the instant action, the Court will conclude that Swami's motion as to double jeopardy in the context of forfeiture must be denied.

* * * * * *

An appropriate Order will issue.

Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

6-22-94
DATE

Clerk's Attestation
[illegible]

Supreme Court, U.S.
FILED
OCT 19 1995
CLERK

No. 95-278

In the Supreme Court of the United States

OCTOBER TERM, 1995

KEITH GORDON HAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause prevents the government from seeking an order of forfeiture in a second trial after reversal of petitioner's convictions where the jury at petitioner's first trial did not return a special verdict concerning the scope of property subject to forfeiture.

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18 U.S.C. 1962(a) 2

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-278

KEITH GORDON HAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 58 F.3d 78. The opinion of the district court (Pet. App. 16-24) is unreported. The opinion of the court of appeals in petitioner's prior appeal is reported at 998 F.2d 1247.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1995. A petition for rehearing was denied on

July 18, 1995. Pet. App. 14-15. The petition for a writ of certiorari was filed on August 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An indictment returned in the United States District Court for the Northern District of West Virginia charged petitioner with conspiring to conduct and participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); investing income derived from a pattern of racketeering activity in the operation of an enterprise, in violation of 18 U.S.C. 1962(a); conspiring to travel in interstate commerce to commit murder, in violation of 18 U.S.C. 371; aiding and abetting travel in interstate commerce to commit murder, in violation of 18 U.S.C. 1958; two counts of conspiring to commit mail fraud, in violation of 18 U.S.C. 371; and four counts of mail fraud, in violation of 18 U.S.C. 1341. Pet. App. 2 n.1; C.A. App. 17-63. The indictment also alleged that petitioner's interest in certain property was subject to forfeiture pursuant to 18 U.S.C. 1963. Pet. App. 2-3; C.A. App. 64-157.

Rule 31(e) of the Federal Rules of Criminal Procedure provides that "[i]f the indictment * * * alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." Petitioner's counsel requested that the court not submit the issue of forfeiture to the jury "unless and until the jury returns a verdict in the case, which would make forfeiture an issue." C.A.

App. 189; see Pet. App. 3. In accord with that request, the district court ruled that the jury initially need decide only whether racketeering proceeds were invested in the property that was alleged to be subject to forfeiture. *Ibid.*; C.A. App. 192-193. In response to the court's ruling, petitioner's counsel drafted an interrogatory to be answered if the jury found petitioner guilty on any of the Racketeer Influenced and Corrupt Organizations Act (RICO) counts. Pet. App. 3. The interrogatory, which was included in the verdict form submitted to the jury, asked the jurors: "Did the defendant acquire an interest in, establish, and/or operate [specified property] with income received from racketeering acts as detailed in [the RICO counts]?" *Id.* at 4; C.A. App. 231.

The jury convicted petitioner on the RICO and mail fraud counts of the indictment, but failed to reach a verdict on the murder counts. The jurors also checked "yes" in response to the forfeiture interrogatory. Pet. App. 3-4; C.A. App. 230-233. After the clerk read the jury's verdict and polled the jurors, the district court thanked the members of the jury for their time and effort, apologized for their inconvenience, and wished them happy Easter.[1] Pet. App. 9.

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[1] The court stated:

> Ladies and gentlemen of the jury, I am not going to delay you very much longer. But I would be remiss if I didn't express to you the fact that [it is] people like you that make the system work.
>
> I have been at it a long time, and been on the bench almost 25 years. I have never gone away from a case in which I didn't think juries had done what they thought was right, which makes it right. But I have never seen a jury take the time and make the effort that you have. And we are very very grateful for that.

The court then dismissed the jury without objection from either counsel. Pet. App. 4, 9-10.

At the sentencing hearing, petitioner's counsel pointed out that the government had failed to obtain a special verdict regarding the extent of the property subject to forfeiture. Pet. App. 4; C.A. App. 236-237. The district court concluded that a new jury could make the requisite findings and advised the prosecutor to "set it down for a jury." Pet. App. 4; C.A. App. 245. The court then entered a general order requiring petitioner to forfeit to the government "all of his interest" in property identified in the forfeiture count of the indictment, but did not order forfeiture of any specific property. Pet. App. 4; C.A. App. 8, 246.

Petitioner appealed his convictions and sentence. The court of appeals vacated his convictions and remanded for a new trial, holding that the district court had erred in admitting evidence of child molestation, homosexuality, and mistreatment of women because the danger of unfair prejudice outweighed the proba-

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> Miss Mallow will go to the office now, and some of you may need a slip or something, and she will take care of it. I have other matters to do. But all of us are ever so grateful to you for your time, you have done your civic duty. And if you are called within the next year and you don't want to serve, I hope you will, but if you don't, you just tell them you have been excused. Because you have done yeoman's work.
>
> Thank you, and I apologize for all of the inconvenience. But if people weren't willing to do it, as you have, then the whole system would fall apart. Have a happy Easter. Thank you.
>
> All right, Marshal, take the jury.

C.A. App. 216-217.

tive value of the evidence. Pet. App. 5; see *United States* v. *Ham*, 998 F.2d 1247 (4th Cir. 1993).

On remand, petitioner moved to dismiss the forfeiture count of the indictment. Because the district court had failed to submit the forfeiture issue to the jury at the first trial, petitioner contended, the Double Jeopardy Clause barred the government from seeking forfeiture in the second prosecution. Pet. App. 5. The district court denied the motion, concluding that the jury's affirmative answer to the forfeiture interrogatory was sufficient to comply with the requirements of Rule 31(e). Pet. App. 5-6, 23-24.

2. Pursuant to *Abney* v. *United States*, 431 U.S. 651 (1977), petitioner filed an interlocutory appeal. The court of appeals affirmed. Pet. App. 1-13. Noting that the jury at petitioner's first trial had not been asked to determine the scope of the property subject to forfeiture, the court of appeals found that "trial never even began on the Rule 31(e) forfeiture issue." *Id.* at 7-8. The court held that "the double jeopardy rules that apply in mistrial situations also apply when a court fails to try a discrete portion of the case before the original jury." *Id.* at 8. Thus, the court stated, "if a defendant has an opportunity to object to the trial court's dismissal of the jury before it decides a discrete portion of the case, but fails to do so, the defendant impliedly consents to the jury's dismissal and cannot raise a double jeopardy defense to further prosecution before a second jury." *Id.* at 9.

The court of appeals determined that petitioner could have asserted his right to have the original jury decide the forfeiture issue before the jurors were

dismissed. Pet. App. 9-10.[2] By failing to object, the court of appeals concluded, petitioner impliedly consented to the dismissal of the jury. *Id.* at 10. The court of appeals therefore held that the Double Jeopardy Clause did not bar submission of forfeiture issues to the jury at petitioner's second trial. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 12-24) that submission of forfeiture issues to the jury at his second trial would violate the Double Jeopardy Clause. That claim is without merit and does not warrant this Court's review.

1. Criminal forfeiture is properly regarded as a punishment, not as an element of the RICO offense or as a free-standing crime. See, *e.g.*, 18 U.S.C. 1963(a) ("The court, in imposing sentence on [any person convicted of a RICO violation] shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection."); *Alexander* v. *United States*, 113 S. Ct. 2766, 2775-2776 (1993) ("The *in personam* criminal forfeiture [authorized by RICO] is clearly a monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'").[3] When a criminal conviction is reversed on

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[2] The court noted that petitioner "probably had strategic reasons for not reminding the court" that the jury had not returned a special verdict on the forfeiture question, since it was "unlikely that [petitioner] wanted the same jury that had just convicted him of nine of the eleven counts also to decide the remaining forfeiture issue." Pet. App. 10 n.4.

[3] The government's brief in No. 94-7427, *Libretti* v. *United States* (argued October 3, 1995), explains in greater detail why criminal forfeiture is properly characterized as a punishment

appeal, the Double Jeopardy Clause generally does not prohibit the imposition at a second trial of penalties that were not imposed at the first. See, *e.g.*, *Schiro* v. *Farley*, 114 S. Ct. 783, 789 (1994). Rather, the "usual rule * * * when a defendant obtains reversal of his conviction on appeal" is that "the original conviction has been nullified and 'the slate wiped clean' [and that] * * * if the defendant is convicted again, he constitutionally may be subjected to whatever punishment is lawful, subject only to the limitation that he receive credit for time served." *Poland* v. *Arizona*, 476 U.S. 147, 152 (1986) (quoting *Bullington* v. *Missouri*, 451 U.S. 430, 442 (1981)). Accord, *e.g.*, *North Carolina* v. *Pearce*, 395 U.S. 711, 720 (1969) ("a corollary of the power to retry a defendant [after a conviction has been set aside] is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction"). Thus, the jury's failure to render a Rule 31(e) special verdict at petitioner's initial trial would not prevent the imposition of a criminal forfeiture penalty if petitioner is again convicted.

This Court has identified two exceptions to the general rule, but neither is applicable to the present case. First, the Court has recognized that "[d]ue process of law * * * requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Pearce*, 395 U.S. at 725. Petitioner does not contend that such vindictive-

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for criminal activity, not as an element of the offense or as a separate crime. See Br. 19-24. We have provided counsel for petitioner with a copy of our brief in *Libretti*.

ness influenced either the government's effort to obtain an order of forfeiture at his second trial or the district court's willingness to submit that issue to the jury. No such contention would be plausible. Indeed, the government sought an order of forfeiture at petitioner's initial trial, and the district court indicated that the issue should be presented to a jury, before petitioner obtained a reversal of his first conviction. See Pet. App. 4.

This Court has also recognized, in the context of capital sentencing, that a judge or jury's decision not to impose a sentence of death may sometimes reflect an implicit determination that the government has "failed to prove its case" regarding the appropriateness of that punishment. See *Bullington*, 451 U.S. at 438-446 (where defendant was convicted and sentenced to life imprisonment, and his conviction was reversed on appeal, Double Jeopardy Clause forbade imposition of a capital sentence if defendant was reconvicted at a second trial); *Arizona* v. *Rumsey*, 467 U.S. 203, 209-210 (1984) (same). Even assuming that the same principle may sometimes apply to non-capital sentencing, it would not be applicable here. As petitioner acknowledges (Pet. 7-8), the jury at his first trial was "never asked to and did not render a verdict" as to the extent of the property subject to forfeiture. The jury made no finding that the prosecution had failed to prove its case with respect to the scope of property subject to forfeiture; instead, "the trial never even began on the Rule 31(e) forfeiture issue." Pet. App. 8.[4] Accordingly, the Double Jeopardy Clause does not

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[4] The jury's only finding on the forfeiture question was its determination that petitioner had invested racketeering proceeds in the property alleged to be subject to forfeiture.

bar imposition of criminal forfeiture if petitioner is retried and reconvicted. See *Poland*, 476 U.S. at 154-157 (Double Jeopardy Clause did not bar capital sentence at second trial where neither the trial nor the appellate court in petitioner's initial prosecution had determined that a capital sentence was inappropriate).

2. The court of appeals treated the district court's dismissal of the jury as analogous to a declaration of a mistrial with respect to the issue of forfeiture. See Pet. App. 8. For the reasons stated above, we believe that petitioner's claim is more appropriately analyzed by reference to the legal principles governing the imposition, at a second trial, of penalties greater than those imposed at the first. Even if the court of appeals' analogy were valid, however, there would be no double jeopardy bar to submission of forfeiture issues to the jury at petitioner's retrial, since petitioner impliedly consented to the dismissal of the jury at the initial trial.

The Double Jeopardy Clause does not bar retrial after a mistrial "granted at the defendant's request or with his consent." *United States* v. *Dinitz*, 424 U.S. 600, 608 (1976). The courts of appeals have consistently held that a defendant's consent may be inferred when the defendant has an opportunity to object to the declaration of a mistrial but fails to do so.[5] See, *e.g.*, *United States* v. *Nichols*, 977 F.2d 972,

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Pet. App. 3-4. Thus, the jury found petitioner guilty on the RICO counts and agreed that he had invested racketeering proceeds in forfeitable property, without being asked to determine the extent of the forfeitable property.

[5] Contrary to petitioner's suggestion (Pet. 21-23), this Court made clear in *Dinitz* that it had "implicitly rejected the contention that the permissibility of a retrial following a

974-975 (5th Cir. 1992), cert. denied, 114 S. Ct. 106 (1993); *United States* v. *DiPietro*, 936 F.2d 6, 9-12 (1st Cir. 1991); *Camden* v. *Circuit Court of Second Judicial Circuit*, 892 F.2d 610, 614-618 (7th Cir. 1989), cert. denied, 495 U.S. 921 (1990); *United States* v. *Puleo*, 817 F.2d 702, 705 (11th Cir.), cert. denied, 484 U.S. 978 (1987). Cf. *Maula* v. *Freckleton*, 972 F.2d 27, 28-29 (2d Cir. 1992) (reprosecution of defendant on weapons charges did not violate Double Jeopardy Clause when defendant had failed to object to trial court's announcement at first trial that it would not submit weapons counts to jury), cert. denied, 113 S. Ct. 1255 (1993).

In this case, the court of appeals correctly concluded that petitioner's consent to the dismissal of the jury at his first trial could be inferred from his failure to object. As the court of appeals observed (Pet. App. 9-10), it was clear from the district court's remarks after the jury returned its verdict that the court was preparing to dismiss the jurors.[6] Petitioner's counsel could simply have reminded the court

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mistrial * * * depends on a knowing, voluntary, and intelligent waiver of a constitutional right." 424 U.S. at 609 n.11 (citing cases). The Court explained that it was error to "treat[] the defendant's interest in going forward before the first jury as a constitutional right comparable to the right to counsel," and that reliance on the waiver standard of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), was misplaced in that context. *Dinitz*, 424 U.S. at 609 n.11.

[6] Thus, petitioner's claim (Pet. 20) that the district court dismissed the jury with "no forewarning" is without merit. In any event, petitioner's disagreement with the court of appeals' determination that he had an adequate opportunity to raise the Rule 31(e) issue before the jury was dismissed does not raise any issue of general importance warranting this Court's review.

that the jury had not yet made the determination required by Rule 31(e). By failing to bring the omission to the district court's attention, petitioner consented to the dismissal of the jury without its having considered the forfeiture issue. See *Maula* v. *Freckleton*, 972 F.2d at 29 (defendant's consent to trial court's failure to submit weapons counts to jury could be inferred from his "strategic choice" not to object).

As petitioner points out (Pet. 17-18), the Sixth Circuit has stated that "[c]onsent to a mistrial order should only be implied where the circumstances positively indicate a defendant's willingness to acquiesce in the order." *United States* v. *White*, 914 F.2d 747, 753 (6th Cir. 1990) (quoting *Jones* v. *Hogg*, 732 F.2d 53, 57 (6th Cir. 1984)). Petitioner cites no case, however, that holds that the Double Jeopardy Clause bars the government from retrying a defendant following a mistrial where the defendant had an opportunity to object to the mistrial but failed to do so. Instead, as the First Circuit has noted, "where courts have held that the failure to object did not foreclose a good double jeopardy plea, they have generally done so because there was no opportunity to object." *DiPietro*, 936 F.2d at 10-11 & nn.25-27 (distinguishing *White*); see *Glover* v. *McMackin*, 950 F.2d 1236, 1240 (6th Cir. 1991) ("summary nature of the trial court's actions" in declaring mistrial and immediately dismissing jury and adjourning court "rendered an objection both unlikely and meaningless"); *White*, 914 F.2d at 754 (jury was discharged before defense counsel "had any reasonable opportunity to consider the import of the declaration of the mistrial and act upon it"). Cf. *Jones* v. *Hogg*, 732 F.2d at 57 (record on appeal failed to show whether defendant objected to

declaration of mistrial and whether defense counsel "was afforded an adequate opportunity to be heard on the question of mistrial").[7] In this case, the court of appeals' conclusion that petitioner had consented to a mistrial was based on its determination (Pet. App. 10) that petitioner "could have * * * prevented the district court from prematurely dismissing the jury." Thus, there is no conflict between the decision below and the cases on which petitioner relies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1995

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[7] In the other Sixth Circuit decision on which petitioner relies (Pet. 18), *Malinovsky* v. *Court of Common Pleas*, 7 F.3d 1263 (6th Cir. 1993), cert. denied, 114 S. Ct. 1300 (1994), the court noted that the defendant had expressly "objected to the trial court's dismissal" of the charges. 7 F.3d at 1272.

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No. 95-278

In the Supreme Court of the United States

OCTOBER TERM, 1995

KEITH GORDON HAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I. CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER RICO FORFEITURE VERDICTS ARE SUBJECT TO DOUBLE JEOPARDY PRINCIPLES, OR THIS PETITION SHOULD BE HELD UNTIL RESOLUTION OF LIBRETTI v. UNITED STATES

For the first time in this action, the government takes the position that RICO forfeiture is punishment for a crime and that Double Jeopardy principles, therefore, do not apply. (Brief in Opp. at 6-7) The government never articulated this position to the District Court or to the Court of Appeals. To the contrary, throughout these proceedings, the government referred to the "RICO forfeiture count of the indictment," and implicitly conceded that, if the jury had rendered the required Rule 31(e) verdict, defendant would be protected by the Double Jeopardy Clause.

The government's newly advanced argument is hardly reason for this Court to deny certiorari review. If anything, the government's new argument creates yet another reason why the decision below merits review; indeed, it highlights the pressing need for this Court's intervention. For if the government is correct, then there is utter confusion in the courts below about the nature of RICO forfeiture and about the significance of a RICO

forfeiture verdict.

Swami argued to the Fourth Circuit that, pursuant to Rule 31(e) of the Rules of Criminal Procedure, he was entitled to a jury verdict on the extent of his interest subject to RICO forfeiture and that the jury would have to make its finding based upon proof beyond a reasonable doubt.[1] Relying on this Court's decision in Bullington v. Missouri, 451 U.S. 430 (1981), Swami then argued that, unlike ordinary sentencing decisions, which are not subject to a reasonable doubt standard and are rarely made by the jury, Double Jeopardy principles apply to RICO forfeiture verdicts. The Fourth Circuit, although finding "implied consent" to a mistrial on the forfeiture count, plainly agreed with Swami's reasoning. (App. 6-8)

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[1] A number of courts have distinguished between the RICO statute and the Continuing Criminal Enterprise Act, 21 U.S.C. §§ 848 and 853, holding that a reasonable doubt standard applies to RICO forfeiture verdicts, although a preponderance of the evidence standard applies to CCE forfeitures. Compare, e.g., United States v. Pellulo, 14 F.3d 881 (3d. Cir. 1994) (RICO -- reasonable doubt standard) with United States v. Sandini, 816 F.2d 869 (3d Cir. 1987) (CCE -- preponderance of the evidence standard).

The government is now arguing that the Fourth Circuit was wrong. According to the government, forfeiture is merely a penalty and "the Double Jeopardy Clause generally does not prohibit the imposition at a second trial of penalties that were not imposed at the first." (Brief in Opp. at 7) In other words, under the government's newly articulated theory, a jury's verdict on a RICO forfeiture count is subject to no Double Jeopardy prohibitions. Thus, if a defendant's RICO conviction is reversed on appeal, at a new trial the government can seek forfeiture of assets the first jury explicitly found were <u>not</u> subject to forfeiture -- even though the jury's verdict as to those assets is the equivalent of an "acquittal" as to those assets.

This Court has never squarely addressed the nature of RICO forfeiture and has certainly never held that a jury's verdict on the extent of a defendant's interest subject to RICO forfeiture is nothing more than a sentencing decision. The courts below have reached inconsistent results about whether a jury verdict on the RICO forfeiture is constitutionally required; whether it is subject to constitutional waiver principles; whether the reasonable doubt standard

applies; and whether double jeopardy principles apply. Compare, e.g., United States v. Robinson, 8 F.3d 418 (7th Cir. 1993) (holding that waiver of jury trial must be knowing and intelligent but suggesting that the right to a jury is not constitutional); United States v. Kravitz, 738 F.2d 102, 106 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985) (suggesting that right to jury determination is not constitutional); United States v. Garrett, 727 F.2d 1003, 1012 (11th Cir. 1984), aff'd on other grounds, 471 U.S. 773 (1985) (holding that a criminal defendant has a Sixth Amendment right to a jury trial on CCE forfeiture); United States v. Patel, 816 F. Supp. 1077 (E.D. Va. 1993) (holding that Double Jeopardy applies to RICO criminal forfeiture verdicts).

The government's Brief in Opposition has made it clear that this case poses very important questions which merit this Court's review. At a minimum, the government's position demonstrates that this Court should hold this case until it decides Libretti v. United States, No. 94-7427, 115 S. Ct. 1398 (1995), granting certiorari to United States v. Libretti, 38 F.3d 523 (10th Cir. 1994) (argued on October 3, 1995), involving the extent to which forfeiture under

the Continuing Criminal Enterprise Act can be treated as a mere sentencing decision, and whether a jury trial on CCE forfeiture is constitutionally required. As the government has acknowledged, its position about criminal forfeiture in Libretti is essentially identical to the position it now asserts in response to Swami's petition. (Brief in Opp. at 6, n.3) Whether this Court ultimately accepts or rejects the government's view of forfeiture, or adopts some other position, its decision in Libretti on the nature of criminal forfeiture will probably have significant bearing on the issues posed in this petition and might well require a remand to the Fourth Circuit. Consequently, we request that this petition be held until Libretti is resolved.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE "IMPLIED CONSENT" DOCTRINE IS CONSISTENT WITH DOUBLE JEOPARDY AND CONSTITUTIONAL WAIVER PRINCIPLES, OR THIS PETITION SHOULD BE HELD UNTIL RESOLUTION OF LIBRETTI v. UNITED STATES

The Fourth Circuit treated the failure to obtain a jury verdict on RICO forfeiture as the functional equivalent of a "mistrial" on the RICO forfeiture count, and then held that Swami had implicitly consented to that

"mistrial" by failing to object when the Court dismissed the jury. (App. at 8) As Swami demonstrated in his Petition, this Court has never addressed whether a defendant can be deemed to have waived his right to have his first jury decide each count of the indictment when neither he nor his counsel has expressly consented to the declaration of a mistrial. As Swami also demonstrated, the Circuits disagree about the validity of the "implied consent" doctrine and the showing that must be made before the doctrine is invoked to deny a defendant's Double Jeopardy claim. (Petition at 16-20)

In response, the government argues that Swami's counsel had an opportunity to object to the court's failure to submit the RICO forfeiture count to the jury, and that counsel's failure to do so is sufficient to constitute a "consent" by Swami to a "mistrial" as to that count. (Brief in Opp. at 10-11) Swami was not present at the charging conference where the forfeiture issue first came up and there is no evidence in the record that he knew anything about the forfeiture discussions or knew that he had a right to a jury verdict on the extent of his interest subject to forfeiture.

In any event, the issue of importance for this Court is not whether there was an opportunity for Swami or his counsel to object -- and we submit that the record does not support the government's position -- but rather whether consent to a mistrial can ever be implied in the absence of evidence that the defendant knew he was giving up his valuable right to have his case decided by the first tribunal and acquiesced in that waiver.

That issue, which has plagued the lower courts, itself merits this Court's attention. But, at the very least, no decision on this petition should be made until the Court resolves Libretti v. United States, No. 94-7427. One of the issues in Libretti is whether a defendant's waiver of his Rule 31(e) right to a jury trial on the forfeiture issue is subject to the waiver standard announced in Johnson v. Zerbst, 304 U.S. 458 (1938). See Brief for the United States at 41-50. If this Court rejects the government's position in Libretti and determines that a criminal defendant's right under Rule 31(e) to a jury determination on forfeiture issues can only be extinguished by a "knowing and intelligent waiver," then the Fourth Circuit's determination that Swami

waived his right to have the first jury decide the RICO forfeiture count by virtue of his counsel's silence is of dubious validity. It would then be appropriate for the Fourth Circuit to reconsider its decision in light of Libretti. Consequently, this petition should be held until Libretti is decided.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, or this petition should be held until resolution of Libretti v. United States, No. 94-7427.

Respectfully submitted,

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